No. 96-1578

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

HON. THOMAS R. PHILLIPS, *et al.*,
Petitioners,

v.

WASHINGTON LEGAL FOUNDATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* SUPPORTING PETITIONERS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

28 pp

QUESTION PRESENTED

Is interest earned on client trust funds held by lawyers in IOLTA accounts a compensable property interest of the client or lawyer, cognizable under the Fifth Amendment of the United States Constitution, despite the fundamental precept of IOLTA that such funds, absent the IOLTA program, could not earn interest for the client or lawyer?

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Pursuant to Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. *Amici* have both a specific and general interest in the issue presented in this case.

Amici have a specific interest in defending the constitutionality of Interest on Lawyers' Trust Account ("IOLTA") programs. These programs have been adopted by all 50 States (with one not yet operational) and the District of Columbia in the belief that such programs are constitutionally sound. IOLTA programs have become a critical source of financial support in providing legal services to the poor.

Amici also have a more general interest in the Fifth Amendment jurisprudence governing the taking of private property for public use. State and local governments are involved in eminent domain proceedings and land-use regulations that provide the basis for most "takings" claims. The question of what constitutes "property" and whether "just compensation" has been paid are thus important issues that affect the daily process of governing at the state and local levels.

Because of the importance of these issues to *amici* and their members, they submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT

1. In 1981, Florida became the first State to implement an IOLTA program, based on similar programs

[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk.

operating successfully in Canada, Australia, and elsewhere. *See In re Interest on Trust Accounts*, 402 So.2d 389 (Fla. 1981); *Petition by Massachusetts Bar Ass'n*, 478 N.E.2d 715, 716-17 (Mass. 1985). Since 1981, the remaining 49 States and the District of Columbia have adopted such programs.[2] IOLTA programs generally have been adopted by order of the state supreme court, as an amendment to court rules or to rules of professional conduct.[3] Five States have implemented their program by statute.[4] The program is mandatory in 26 States; in the remainder the program is either voluntary or includes an opt-out provision. *See* ABA Comm'n on Interest on Lawyers' Trust Accounts, *IOLTA Update* 5 (Feb. 1996).

[2] The Indiana IOLTA program has been approved in principle but is not yet operational.

[3] The IOLTA programs in the following States have been adopted by order of the highest court in the State: Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. In addition, the IOLTA program in the District of Columbia was promulgated by an order of the District of Columbia Court of Appeals. In seven States, the order establishing the IOLTA program was accompanied by formal opinion. *See infra* note 12.

[4] *See* Cal. Bus. & Prof. Code § 6211 (West 1990); Conn. Gen. Stat. § 51-81c (1985); Md. Code Ann., Bus. Occ. & Prof. § 10-303(b) (1995); N.Y. Jud. Law § 497 (McKinney Supp. 1997); Ohio Rev. Code Ann. § 4705.09 (Anderson 1997). Pennsylvania's IOLTA program previously operated by statute, *see* Pa. Stat. Ann. tit. 62, § 4021 *et seq.* (West

While the details of these programs vary among jurisdictions, the basic operation of each is the same. The "fundamental precept" of the program (Pet. i) is that certain funds of clients held in trust by a lawyer cannot reasonably be expected to earn interest sufficient to offset the transaction costs that would be incurred in determining and disbursing the earned interest attributable to each client's funds. Under an IOLTA program, these funds—which generally are nominal in amount or held for a short period of time —are deposited by the lawyer into a common, interest-bearing demand account. The interest earned on the account is then remitted to the state bar or to a fund administered by the bar or other state entity, which uses the funds so received to fund a variety of legally-related public service programs.

Interest from IOLTA programs has become a critical source of funding for legal services to the poor. *See IOLTA Update* at 4. In 1994, of the $91 million in total grants made by IOLTA programs, over $85 million went to legal services. *Id.* Other general categories of grants include administration of justice, public legal education, law student scholarships and service activities, and indigent defense. *Id.*

Virtually all States require that funds eligible for IOLTA deposit be "nominal in amount" or held "for a short period of time" before they can be eligible for deposit in an IOLTA account. For some, this is the only statutory requirement.[5] Several States, however,

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1996), but the statute has been supplanted by a bar rule, *see* Pa. R. Prof. Conduct 1.15(d)(1); Pa. R. Disciplinary Enforcement R. 601(d).

[5] *See, e.g.*, Ala. R. Prof. Conduct 1.15(f); Alaska R. Prof. Conduct 1.15(d); Cal. Bus. & Prof. Code § 6211(a) (West

make explicit the assumption that such funds will not generate interest in excess of fees and specify that IOLTA-deposited funds cannot reasonably be expected to earn a positive net return for the client.[6] Many set out factors that a lawyer must consider in determining whether funds will generate sufficient interest income to justify the expense of administering a segregated account.[7] Others set a minimum threshold

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1990); Colo. R. Prof. Conduct 1.15(e)(2); D.C. Ct. App. R.X, Appendix B (a)(1); Ga. Code Prof. Responsibility DR 9-102(C)(2); Idaho R. Prof. Conduct 1.15(d); Kan. Sup. Ct. R. 226, R. Prof. Conduct 1.15(d)(3); Miss. R. Prof. Conduct 1.15(e); Mont. R. Prof. Conduct 1.15(e); Neb. Code Prof. Responsibility DR 9-102(C); Nev. S. Ct. R. 217; N.H. S. Ct. R. 50; N.C. R. Prof. Conduct Canon X, R. 10.3(a); Ohio Rev. Code Ann. § 4705.09(A)(2) (Anderson 1997); Okla. Stat. Ann. tit. 5, Ch. 1, App. 3-A, R. 1.15(d) (1996); R.I. R. Prof. Conduct 1.15(d); S.C. App. Ct. R. 412(a); S.D. R. Prof. Conduct 1.15(d)(3); Tenn. S.Ct. R. 8, Code Prof. Responsibility DR 9-102(C)(2); Vt. Code Prof. Responsibility DR 9-103(A); Wyo. R. Prof. Conduct 1.15, sec. II(a).

[6] *See, e.g.*, Me. Code Prof. Responsibility 3.6(e)(3) & (7); Ky. S. Ct. R. 3.830(2)(A); Pa. R. Prof. Conduct 1.15(d)(1); Va. Code Prof. Responsibility DR 9-102(E)(1); Wash. R. Prof. Conduct 1.14(c)(3); W. Va. R. Prof. Conduct 1.15(d)(1); Wis. S. Ct. R. 20:1.15(c)(3); *cf.* Iowa Code Prof. Responsibility DR 9-102(C)(3) (funds not eligible for IOLTA deposit if they would produce a "significant positive net return").

[7] For example, Massachusetts asks lawyers to consider "the amount of interest likely to be earned during the period the funds are expected to be deposited, as well as the estimated cost of establishing and administering a separate client fund account, including reasonably imputed overhead costs, and the estimated cost of preparing any tax or other reports required for interest accruing to a client's benefit." Mass. Sup. Jud. Ct. R., Sec. E, Guidelines for Interest on Lawyers' Trust Accounts, A(2)(b). *See also* Ariz. Sup. Ct. R. 44(c)(4);

of interest that must be earned, on the assumption that interest below such a threshold will not cover transaction costs of establishing a separate account.[8] Finally, several state courts have interpreted their IOLTA rules against the background requirement that a lawyer who reasonably expects that client funds will yield enough interest to offset transaction costs is ethically obligated to make the funds produce income for the benefit of the client.[9]

2. The Texas IOLTA program at issue in this case is typical of IOLTA programs generally. The Supreme Court of Texas approved implementation of an IOLTA program after it found that "[o]n certain client funds held by attorneys, interest income cannot reasonably be earned to benefit individual clients for

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Ark. R. Prof. Conduct 1.15(d)(5); Del. R. Prof. Conduct, Interpretative Guidelines No. 2(m); Fla. Bar R. 5-1.1(e)(7); Hawaii S. Ct. R. 11(C)(2)(F); Ill. R. Prof. Conduct 1.15(e); Minn. R. Prof. Conduct 1.15(f); Mo. S. Ct. R. 4, R. Prof. Conduct 1.15(d)(2); N.M. R. Prof. Conduct 16-115(F); N.Y. Jud. Law § 497(4)(b) (McKinney Supp. 1997); N.D. R. Prof. Conduct 1.15(d)(3); Or. Code Prof. Responsibility DR 9-101(D)(4).

[8] *See* La. R. Prof. Conduct 1.15, IOLTA R. 3(d) ($50 threshold); Md. Code Ann., Bus. Occ. & Prof. Code Ann. § 10-303(b) (1995) ($50 threshold); Mich. R. Prof. Conduct 1.15(d) ($50 threshold); N.J. Court R. 1:28A-2(b)(4) ($150 threshold). Connecticut requires that the funds be "less than ten thousand dollars in amount or . . . held for a period of not more than sixty business days." Conn. Gen. Stat. § 51-81c(a) (1985).

[9] *See, e.g., Massachusetts Bar Ass'n*, 478 N.E.2d at 718; *id.* at 719 (Nolan, J., concurring); *In re Interest on Lawyers' Trust Accounts*, 672 P.2d 406, 407 (Utah 1983); *In re Petition of Minnesota Bar Ass'n*, 332 N.W.2d 151, 157-58 (Minn. 1982); *In re New Hampshire Bar Ass'n*, 453 A.2d 1258, 1261 (N.H. 1982).

whom the funds are held." Pet. App. 56a. As in most States, these are defined as funds that "are nominal in amount or are reasonably anticipated to be held for a short period of time." *Id.* at 57a.

In Texas, funds are considered nominal in amount or held for a short period of time

> if such funds, considered without regard to funds of other clients which may be held by the attorney . . . could not reasonably be expected to earn interest for the client or if the interest which might be earned on such funds is not likely to be sufficient to offset the cost of establishing and maintaining the account, service charges, accounting costs and tax reporting costs which would be incurred in attempting to obtain interest on such funds for the client.

Id. at 57a-58a.[10] If a lawyer determines in good faith that he or she is holding funds that meet these criteria, the lawyer is instructed to deposit the funds in an IOLTA account, with interest to be transmitted quarterly to the Texas Equal Access to Justice Foundation. *Id.*

3. Alleging that the Texas IOLTA program violated their rights under the First and Fifth Amendments, respondents brought suit in U.S. District Court. The District Court granted summary judgment for petitioners on the ground that respondents had no constitutionally cognizable property interest at

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[10] Also to be considered are "the nature of the proceeding or transaction involved and the likelihood of delay in the need for such funds in such proceeding or transaction." Pet. App. 58a. Moreover, attorneys are instructed to review placement of the funds at reasonable intervals to determine whether changed circumstances would merit moving the funds to a separate account. *Id.*

stake because, in the absence of the IOLTA program, they could not earn interest on funds in IOLTA accounts. Pet. App. 20a-40a. The decision was consistent with decisions from the First and Eleventh Circuits [11] and the highest appellate courts of seven States.[12]

The Fifth Circuit reversed. Pet. App. 1a-19a. The court found a property interest despite the District Court's findings, which it did not dispute, that "the only funds eligible for deposit in an IOLTA account are those that have no reasonable possibility of legally generating net interest income benefiting the client" and that "under the IOLTA Rules, the principal amounts at issue cannot be reasonably expected to earn net interest on their own." *Id.* at 23a-24a, 27a n.7.

The Fifth Circuit reasoned that whether the interest on IOLTA funds constitutes "property" for purposes of the Fifth Amendment does not depend on the value of the interest to the owner of the principal

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[11] *See Washington Legal Found. v. Massachusetts Bar Found.*, 993 F.2d 962, 975-76 (1st Cir. 1993); *Cone v. State Bar of Florida*, 819 F.2d 1002, 1007 (11th Cir.), *cert. denied*, 484 U.S. 917 (1987).

[12] *See Massachusetts Bar Ass'n*, 478 N.E.2d at 717-18; *In re Adoption of Amendments to C.P.R.D.R. 9-102 IOLTA*, 102 Wash. 2d 1101 (1984); *In re Interest on Lawyers' Trust Accounts*, 675 S.W.2d 355, 356-58 (Ark. 1984); *In re Interest on Lawyers' Trust Accounts*, 672 P.2d 406 (Utah 1983); *New Hampshire Bar Ass'n*, 453 A.2d at 1261; *Minnesota Bar Ass'n*, 332 N.W.2d at 159; *Interest on Trust Accounts*, 402 So.2d at 396; *see also Carroll v. State Bar of California*, 213 Cal. Rptr. 305, 312 (Ct. App. 1984) (intermediate California appellate court decision upholding IOLTA program), *cert. denied*, 474 U.S. 848 (1985).

once transaction fees are deducted. Pet. App. 13a-14a. According to the Fifth Circuit, the courts that have upheld these programs have erroneously defined "property" as "an interest that must necessarily benefit its owner." *Id.* at 12a. The court found no such requirement in this Court's takings jurisprudence. In particular, the Fifth Circuit understood this Court's decision in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980), as having created a "rule" for defining property "that is independent of the amount or value of interest at issue." *Id.*

Thus, the court concluded, the fact that the interest earned on IOLTA accounts is valueless to the client (once fees are deducted) is irrelevant, because a Fifth Amendment property interest "attaches the moment that the interest accrues." *Id.* at 13a. Having reversed the District Court's determination that clients did not have a valid property interest in the interest proceeds on funds in IOLTA accounts, the Fifth Circuit remanded the case for reconsideration. *Id.* at 19a.

SUMMARY OF ARGUMENT

Amici agree with petitioners and their other supporting *amici* that interest generated from IOLTA funds is not "property" protected by the Fifth Amendment. *Amici* focus on an additional argument, based on just compensation principles, in support of petitioners. The Fifth Amendment does not proscribe the taking of private property for public use; it proscribes taking private property for public use "without just compensation." *Williamson County Reg. Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985). Applying well-established principles, the

"just compensation" for a taking of the interest on IOLTA trust accounts is zero. For purposes of the Fifth Amendment, the value of property is determined by what "the owner [has] lost," not what "the taker [has] gained." *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910). In the case of IOLTA programs, the "owner" of the putative "property" taken (*i.e.*, the interest earned on the owned funds) has lost nothing, because the funds by definition are not reasonably expected to generate interest in excess of the transaction costs that would be incurred in determining and distributing the interest generated. Absent an IOLTA program, clients could not realize the "use value" of such funds, and banks and other financial institutions in which client funds are deposited would enjoy use of the funds. IOLTA programs transfer the use value of those client funds from financial institutions (which clearly lack a constitutionally-protected interest in the use value of the funds) to the government. That transfer is not compensable under the Fifth Amendment.

Where "nothing of value was taken," "[n]othing [is] recoverable as just compensation." *Marion & Rye Valley Ry. v. United States*, 270 U.S. 280, 282 (1926). To say that an interest is not compensable under the Fifth Amendment is another way of saying that it is not a constitutionally-protected property interest. In the case of interest earned on IOLTA funds, nothing of value is taken from the property owner. Consequently, interest on IOLTA accounts is not a compensable property interest under the Fifth Amendment.

ARGUMENT

THE TEXAS IOLTA PROGRAM DOES NOT TAKE A COMPENSABLE PROPERTY INTEREST

Amici agree with petitioners that the interest generated from IOLTA funds is not a constitutionally cognizable property interest. The fundamental precept of IOLTA is that the client's funds, absent the IOLTA program, could not earn interest for the client-owner in excess of the transaction costs of determining and disbursing earned interest, including any overhead and tax reporting costs. Prior to the adoption of IOLTA programs, clients entrusting their lawyers with funds to be held for a short period of time or funds nominal in amount received nothing back in excess of the initial principal. Following the adoption of IOLTA programs, the clients' financial position is unchanged. Respondents' argument that IOLTA simultaneously creates and takes away a constitutionally-protected property interest must be rejected.

Without disputing that the only funds eligible for deposit in an IOLTA account are those that have no reasonable possibility of generating net interest income benefitting the client, the Fifth Circuit found a property interest by applying a "two-part process" theory of accrued interest. Pet. App. 13a. The court held that a bank first pays interest on the account and then deducts fees, and that the "property interest attaches the moment that the interest accrues." *Id.*

Petitioners, and other *amici* supporting them, have demonstrated that this two-step approach is invalid, because there would be no first step absent IOLTA. Rather than repeat those arguments here, *amici* suggest an additional reason that the decision below

must be reversed. "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson County Reg. Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985) (citations omitted). In the case of IOLTA programs, "just compensation" means no compensation at all, because the programs are structured in such a way that nothing of monetary value to the owner is taken. Because IOLTA programs do not take a compensable interest in property, they do not violate the Fifth Amendment.

In some cases, the Court has found it possible to separate the question whether government action takes a compensable property interest from the amount of compensation that is constitutionally required. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) (holding that a permanent physical occupation of real property is a taking, and remanding for a determination of the amount of compensation due). In this case, however, the two questions are not analytically distinct. "In the sense used in the Fifth Amendment, property refers to any interest recognized as property in the law *and which requires compensation if acquired by the government through eminent domain.*" 2 Julius L. Sackman, *Nichols on Eminent Domain* § 5.01[2][b][i], at 5-9 (rev. 3d ed. 1997) (emphasis added). *See also id.* § 5.01[5][c], at 5-34 to 5-35 (interest is not "property" within the meaning of the Fifth Amendment unless it is "practicable to place a money value" on the interest) (footnote omitted). In *Williamson*, this Court recognized the connection between just compensation and the definition of compensable property interests by reaffirming that there is no violation of the Fifth Amendment until the government has denied just compensation. 473 U.S. at 194-95 & n.13. *See also First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987); *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1018 n.21 (1984).

As explained below, the structure of IOLTA programs is such that the interest earned and paid on IOLTA accounts has no monetary value to any individual owner of the pooled principal on which the interest is earned, and thus is not, as to any such owner, a compensable property interest cognizable under the Fifth Amendment. Accordingly, the Court's just compensation cases bear directly on whether interest on IOLTA accounts is a cognizable property interest under the Fifth Amendment.

A. Just Compensation Is Measured By The Property Owner's Loss, Not The Government's Gain

In 1910, Justice Oliver Wendell Holmes, speaking for a unanimous Court, said that in valuing property that has been taken by the government "the question is what has the owner lost, not what has the taker gained." *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910). *See also id.* at 194 (government is not obligated to compensate a property owner "for a loss of theoretical creation, suffered by no one in fact"). Since that time, this Court has consistently upheld the rule that just compensation is determined by the loss to the property owner, not the gain to the government. *See, e.g., United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 633-36 (1961); *United States v. Pewee Coal Co.*, 341 U.S. 114, 121 (1951) (Reed, J., concurring); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 13 (1949); *United States v. Causby*, 328 U.S. 256, 261 (1946).

In *Kimball Laundry*, the Court explained why just compensation must be based on the loss to the owner rather than the benefit to the taker: If farmland is taken by the government to be used as a firing range, the farmer loses his business as well as his land. By contrast, if the same farmer owned swamp land that was taken by the government to be used as a firing range, the farmer would have lost only his land. *See* 338 U.S. at 13. In both cases, the gain to the government—the firing range—is the same. The loss to the owner, however, differs dramatically. As the Court stated, "[i]f benefit to the taker were made the measure of compensation, it would be difficult to justify higher compensation for farm land taken as a firing range than for swamp or sandy waste equally suited to the purpose." *Id.*

This valuation principle applies with equal force when the gain to the government is of greater value than the loss to the property owner, as would be the case here if interest on IOLTA funds were deemed protectable property. *Nortz v. United States*, 294 U.S. 317 (1935), is illustrative. *Nortz* involved gold certificates that had been issued by the federal government to individuals. The gold certificates operated like today's savings bonds except that the certificates were redeemable for gold coin. The plaintiff, Nortz, owned gold certificates worth $106,300 in currency, and $170,634 in gold. *See* 294 U.S. at 323. Subsequent to Nortz's purchase of the certificates, Congress enacted the Emergency Banking Act, requiring all holders of gold coin, gold bullion and gold certificates to deliver them to the Treasurer of the United States. *Id.* at 327. Nortz delivered his gold certificates and received $106,300 in currency. Nortz filed suit, arguing that he did not receive just compensation for the gold certificates taken by the government. He argued that had he been paid in gold coin, he would have received the cash equivalent of $170,634 because of the increase in value of gold. *Id.* at 323-24, 329. The Court rejected Nortz's argument, explaining that there was no free market for gold as a result of the Emergency Banking Act and other legislative measures prohibiting the trade and export of gold by anyone other than an authorized gold dealer. *Id.* at 329-30. Because Nortz was not an authorized dealer, the Court reasoned that he was entitled only to the value of the certificates in cash because he could not sell the gold on the open market. *Id.*

Applying these valuation principles, the value of interest on IOLTA account funds must be determined from the point of view of the owners of the pooled principal—the clients—and not the government.[13] This involves ascertaining the fair market value of the property in the hands of each owner.

In *United States v. Miller*, 317 U.S. 369 (1943), this Court reaffirmed the rule that just compensation is established as the market value of the owner's interest at the time of the taking. *Id.* at 374. Market value is usually defined as that which "a willing buyer would pay in cash to a willing seller." *Id.*; *accord United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979); *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 474 (1973);

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[13] Lawyers clearly lack a compensable property interest in interest earned on client trust funds. In Texas, as elsewhere, ethical rules prohibit lawyers from pooling client funds for the lawyer's benefit. *See Tex. Disciplinary R. Prof. Conduct* 1.14.

Virginia Elec. & Power Co., 365 U.S. at 633; *United States v. Petty Motor Co.*, 327 U.S. 372, 377-78 (1946). Under the market value standard, "[t]he owner is to be put in the same position monetarily as he would have occupied if his property had not been taken." *United States v. Reynolds*, 397 U.S. 14, 16 (1970). *See also Olson v. United States*, 292 U.S. 246, 255 (1934) (owner "is entitled to be put in as good a position pecuniarily as if his property had not been taken," but "is not entitled to more").

The market value standard "is not an absolute standard nor an exclusive method of valuation." *Virginia Elec. & Power Co.*, 365 U.S. at 633; *accord United States v. Fuller*, 409 U.S. 488, 490 (1973). Courts have deviated from the market value standard in cases involving the loss of profits, damage to good will, expense of relocation, and other such consequential losses. But "[d]eviation from [the market value] measure of just compensation has been required only 'when the market value has been too difficult to find, or when its application would result in manifest injustice to owner or public.'" *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984) (quoting *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950)).

There is no reason to deviate from the market value standard in this case. Financial institutions engaged in the business of paying interest for the use of funds establish a market value for the use of money. Applying the market value standard works no injustice on clients, who could not realize any interest on the funds in the absence of an IOLTA program. Indeed, awarding compensation under a non-market value standard would amount to awarding clients a windfall.

B. Just Compensation Does Not Include Compensation For Property Values That Are Enhanced Because Of Revocable Government Action, Or That Result From A "Combination" That The Property Owner Could Not Effect

It is well-established that the government does not have to compensate the owner for property values that are enhanced because of the use to which the government intends to put the property. *See Fuller*, 409 U.S. at 492; *Reynolds*, 397 U.S. at 16; *United States v. Cors*, 337 U.S. 325, 334 (1949); *Miller*, 317 U.S. at 377. *Cors*, for example, involved a government taking during World War II of a steam tug owned by a private individual. The government's demand for steam tugs to be used during the war greatly increased the value of these vessels. *See* 337 U.S. at 328-29. The owner of the tug argued that just compensation should be measured by the value of the steam tugs after the government announced its intent to institute a wartime ship requisition. *Id.* at 327. The Court rejected this argument, holding that "[i]t is not fair that the government be required to pay the enhanced price which its demand alone has created." *Id.* at 333.

In *Fuller*, a cattle farmer had obtained a permit from the federal government to graze his cattle on neighboring lands owned by the federal government. *See* 409 U.S. at 488-89. The government later condemned a portion of the farmer's land adjacent to the grazing land. *Id.* at 489. The farmer argued that the grazing permit greatly increased the value of the condemned land and the government should pay for the increased value. *Id.* The Court reaffirmed the principle that the government "need not compensate for value which it could remove," *id.* at 492, and held that

the value of the farmer's property was to be assessed on its own and not in combination with property used by permit from the government. *Id.* at 492-93.

In *United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266 (1943), the federal government condemned 12,000 acres of land in North Carolina on behalf of the Tennessee Valley Authority. The landowner argued that the value of the land should be assessed by reference to its value if used in combination with other lands that he could have acquired, but did not, by power of eminent domain previously granted to him by the State. *Powelson*, 319 U.S. at 274. The Court cited previous cases in which it had denied recovery "for a value dependent upon a combination which [the landowner] could not reasonably expect to effect." *Id.* at 276 (citing *McGovern v. New York*, 229 U.S. 363 (1913)). The fact that the landowner had been given the power of eminent domain—and thus might reasonably have expected to bring about the combination of land parcels that would have increased the value of all—was irrelevant, the Court held, because "just compensation" should not include the enhanced value resulting from a privilege conferred by the State. *Id.* at 276-77.[14]

C. IOLTA Programs Do Not Take a Compensable Interest In Property

The analysis in *Cors*, *Fuller* and *Powelson* applies to this case. In the case of IOLTA programs, the fair market value of the owner's property interest is what he or she would have earned in the absence

[14] The Court did not find it significant that the federal government had "taken" the property whereas the State had conferred the privilege artificially enhancing its value. *Powelson*, 319 U.S. at 278-79.

of the program. Absent an IOLTA program, a client entrusting to a lawyer funds that are nominal in amount or to be held for a short term could not expect to earn a return on the funds so entrusted. Nor could the client "effect [a] combination," *Powelson*, 319 U.S. at 276, by pooling funds with others similarly situated, that would make the use value of that client's funds realizable by the client. Absent an IOLTA program created by a State, the use value of such client trust funds would inure solely to the financial institutions holding the funds. It is the government's power to require that such funds be aggregated to a point where the collective use value is realizable as interest paid, and then to require that the interest be used for public purposes rather than inure to the banks, that results in any interest at all being paid on the funds in trust. As in *Cors*, *Fuller*, and *Powelson*, this enhancement created by government action should not be taken into account in determining the fair market value of the property that has been taken.[15]

The Court's judgment in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), is not inconsistent with this approach. In that case, having found a constitutionally-protected property interest in the interest generated on an interpleader fund, the Court found that the money to be refunded to the petitioning party was the amount in the fund less

[15] IOLTA funds would have a "use value" in the absence of IOLTA programs, but that use value would be appropriated by banks and other financial institutions that receive deposits without paying interest on them. IOLTA programs transfer the use value of IOLTA funds from banks (which clearly lack any constitutionally-protected property interest) to governments.

charges attributable to maintenance of the account. *See* 449 U.S. at 161. The Court rejected the State of Florida's argument that "having mandated the accrual of interest," the State was "entitled to assume ownership of the interest." *Id.* at 162. In the case of IOLTA programs, the States do more than simply mandate the accrual of the interest. They make the accrual of interest possible by aggregating funds for which a net positive return would otherwise not reasonably be expected. Therefore, unlike the situation in *Webb's*, the government puts the property owner's funds to a use which the owner could not replicate in the absence of the state program.

Contrary to the court of appeals' suggestion (Pet. App. 12a), *Webb's* does not recognize a "rule" for defining property "that is independent of the amount or value of interest at issue." In *Webb's*, the Court had no difficulty in determining that the value of the interest at issue was more than $100,000, after deduction of a statutory fee. 449 U.S. at 158. Absent the Florida law at issue in *Webb's*, the owner of the funds (which amounted to more than $1.8 million) clearly could have realized the use value of those funds. Thus, *Webb's* does not stand for the proposition that courts decide whether an asserted property interest is cognizable under the Fifth Amendment without reference to whether the interest has any economic value to the party asserting it.

In sum, only those client funds that would not otherwise earn interest for the client may be deposited into IOLTA accounts. Without the benefit of aggregation of funds provided by the IOLTA program, the individual deposits would have no realizable value to the owners of the funds beyond the principal amounts. Because the interest earned on IOLTA

funds results from the government program, the fair market value to the client is what it would be in the absence of the government program: zero. Client-owners thus have no entitlement under the Fifth Amendment to compensation for interest on IOLTA funds. *See generally Marion & Rye Valley Ry.*, 270 U.S. at 282 ("nothing [is] recoverable as just compensation, because nothing of value was taken"); *see also Pewee Coal Co.*, 341 U.S. at 121 (Reed, J., concurring); *Nortz*, 294 U.S. at 327-30. An interest that is not compensable under the Fifth Amendment is not a constitutionally protected property interest.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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August 25, 1997

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